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CASE NO. _____

IN THE SUPREME COURT OF
THE UNITED STATES

TERM OCTOBER 1993

OLIVER RAY MOORE, PETITIONER

V.

MEMBER DATA .

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is the Employers Misconduct, failure to produce or identify Materials of discovery after being ordered produced by a Magistrate Judge, and without an appeal of the Magistrates specific Order, Grounds for Relief from Summary Judgement un considered by review court. ?

Did the Employee Show the lower courts that a relief requested among others was "Misconduct" ?

If the Employee, non-Moving party to a summary judgement motion Showed Proof that Discovery is not complete by undisputed affidavit is relief from Summary Judgement appropriate since the

employer did not appeal the District Judges order Denying exceptions to the order on motion to compel discovery ?

Does the Employee, non-Moving party to a summary judgement motion, have to further argue to higher courts that the discovery, not yet obtained is Material to his Case if their was no appeal of the magistrates Judges specific order on Motion to compel discovery from the Employer ? If So is a Response to a motion to summary Judgement the Place to argue these disputed facts ?

Does not The Employers failure to Appeal the Magistrates order on motion to compel discovery wave its right to argue that the specific items requested and ordered compelled by a magistrate are Material ?

By a District Courts un-vacated un-appealed order denying "all" exceptions

of the parties to a magistrates judges order to compel items in discovery is their any Just reason why the non moving party to a motion for summary Judgement should not have "all" the items order compelled by a magistrate "merits" Judge prior to responding to a case on the Merits ?

If the Magistrate Judge of the district has determined that discovery is complete via a verified Claim from the employer subject to penalty of perjury Yet the Employee Produces proof that the employers claim is false, is this misconduct, is discovery complete, and would it be proper to Relieve, the employee, a non-moving party from summary judgement on the grounds of Misconduct, incomplete discovery ?

Is A Response to a summary Judgement Motion the Proper place to argue additional discovery issues ?

Is A Response to a Summary Judgement Motion the Proper Place to argue Misconduct issues of the Moving party if facts pertain to Material issues determined by un appealed order on motion to compel discovery ?

If allowed that the non-moving party to a summary judgement motion does not receive its un appealed discovery ordered compelled by a magistrate of the district and this case concluded without a hearing, trial, does this not make the discovery process moot and eliminate a full and fair preparation to a case and a violation of the VII amendment to the United States Constitution.?

In deciding a Motion for summary judgement is it proper to view the facts and the inferences from those facts in the light most favorable to the Non-moving party and did the lower courts act properly ?

In Ruling on a Motion for summary Judgement if the party fails to respond on the Merits is it proper to enter summary judgement on the merits or rather a circumstantial default judgement? Also If The court answers default should not the Court first also address the issue of pending discovery "default" by the moving party ? Yet if the court answers Summary Judgement on the " Merits" is the proper judgement, then Should not the employers Misconduct, failure to produce discovery after being ordered to do so, be heard and properly decided prior to any merits of the case especially when the controversy shall exceed twenty delawares to preserve the Employee's Constitutional rights as determined by the VII amendment? Did the review court know that relief by an asserted ground of misconduct is one item for its review? Did the review court review the properly argued grounds for relief,

"Misconduct" ?

Should not the intent of "Misconduct" and illegal Treatment and termination in an employment discrimination case rule out Judgement by "Summary" all together?

TABLE OF CONTENTS

OPINIONS BELOW	4
JURISDICTION	7
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	8
STATEMENT OF CASE	8
REASONS FOR GRANTING THE WRIT	48
CONCLUSION	56

Table of authorities cited

Frank Keevan & Son v. Callier Steel Pipe & Tube (1985) 107 F.R.D. 665, 670.

Federal Sav. and Loan Ins. Corp. v. Willaims 599 F.Supp. 1184, 1195, 1196 (1984).

Badalamenti v. Dunham Inc. 896 F.2d 1359, 1362 (Fed.Cir 1990)

Rockstroh v. A.H. Robins Co., Inc. 602 F.Supp. 1259, 1264, 1265 (1985).

Anderson v. Cravovac Inc. 862 F.2d. 910,923 (1stCir. 1988)

Cowen v. J.C. Penney Company Inc. 790 F.2d. 1529,1532,1533 (11 Cir. 1988.

Parrish v. Board of Commissioners of Alabama State Bar 533 F.2d. 942, 948 (5th Cir. 1976).

Snook v. Trust Co. of Ga. Bank of Savannah N.A. 859 F.2d. 865, 870, 871, 172 (11th Cir 1988)

STATUTES:

United States Law Code:

28 USC § 1254 (1)

United States Law Code:

28 USC § 636 (e)

United States Law Code

42 USC § 2000e-5

United States Law Code

42 USC § 2000e-5(g)

United States Constitution,

V Amendment

Unites States Constitution,

VII AMENDMENT.

No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

TERM October 1993

OLIVER RAY MOORE, Petitioner

VS.

MEMBER DATA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Oliver Ray Moore, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Sixth Circuit Refusing to consider and grant relief from summary judgement and dismissal of action on the grounds of misconduct and refusing the consider and decide other pending interlocutory appeals and motions and appropriate equitable relief by its non-action while under its Jurisdiction. We further Pray that this Court Read and Consider the appeal on the grounds as set out on page 4 in the Appellants Brief yet never considered at the Review Court Level as well as this Petition. And we further pray the this court Over turn the Sixth Circuit Decisions and allow Relief From summary Judgement and dismissal of action on the Grounds of Misconduct and abuse of discretion furthermore Vacate the U.S

District Courts Decision as an abuse of discretion and adjudge the Defendant, Respondent for Contempt and enter default judgement (reference 28 U.S.C. § 636 (e)).; Yet withstanding the arguments for Contempt, enter a default judgement against the defendant pursuant to Motion for Default Judgement and no protective orders; Yet withstanding arguments of contempt and default judgement, adjudge the Defendant for Perjury, which Magistrate determined to be the penalty if their is proof that discovery is not complete as of 1-27-92 (Pursuant to Order Denying Motion for Default, Motion for Sanction, and Motion for Relief page 2 paragraph 2); Yet withstanding contempt, default, judgement, and perjury arguments, reopen this case for further proceedings and discovery, to assure that the Appellant gets all documents Ordered Produced in Discovery, reference docket entry 128 un

appealed.

OPINIONS BELOW:

Un published discission of the District court Refusing exceptions beyond 10 days and by motion of the magistrates unpublished Determination on order on motion to compel discovery attached, district Court,DC, entry 101 un appealed. District Courts Un-published Discission Denying All Exceptions, excluding request for production 8, to the magistrates Order on motion to compel discovery, DC docket 128 un appealed. Un-Published diocesan of district Court to the Effect that Discovery shall Conclude on December 20, 1991 and the Court does not feel that any extension through January 31, 1992 is JUST, DC Order on Motion to Extend Time attached un appealed. Magistrates suggestion to allow exception to order on Motion to compel discovery, and dis

allow protection of pending 56F motion based of conditions and terms that as of 1-27-92 that plaintiff " ha[d] all the discovery materials requested that can be produced by the defendant". verified and subject to the penalty of perjury. DC, entry 145. The suggestion to allow Exception is out of order See entry 101, and 128. and the Failure to apply for timely protection 26c before 37d Motion for default Judgement. The District Courts Adopts the Magistrates Suggestions and terms-conditions. Plaintiff, Petitioner takes exception at 148 the Districts Courts denied exceptions. at docket 150 a 59(e) appeal request for reconsideration and for sanctions is filed " Still pending" a ruling from the District Court. We believe the Magistrates suggestion is not in effect. however. District Court Docket 156 the District courts un-published decision ordering Plaintiff,

Petitioner to respond in full to the pending motion for summary Judgement within 10 days and failure to respond to shall result in granting of the Summary Judgement Motion and dismissal of this case. Docket 157 Plaintiff, Petitioner filed an Exception to this specific Order by rule 60(b)(3) Again the DC, Court has not ruled on the Appeal. Six Circuit Case Determined that by test the order did not Exceed toll and is to be construed as a 59(e) and pending a ruling of the District Court. See 92-6689 Test attached. At District Court Docket 166 District Court Grants Summary Judgement and Dismisses cause with Prejudice indication that decision was made that it adopted the magistrates determination and terms-conditions that as of 1-27-92 the Plaintiff "ha[d] all the discovery materials requested that can be produced by the defendant" At Docket 168 There was an appeal to

relieve party from this order on the GROUNDS of MISCONDUCT. At Docket 176 is the unpublished discission Order Denying Motion for Relief from Judgement. Docket Entry 177 a timely Notice of Appeal was Served on the District Court. The Parties Briefed. On March 8, 1994 the U.S. Court of Appeals for the Sixth Circuit Produced its Determination Which was not recommended for Full Text Publication Yet attached"

JURISDICTION:

The Court of Appeals' Opinion in this matter 93-5647 was filed on March 8, 1994. A Petition for Rehearing enbanc was received on Monday March 28, 1994 through the Mail which should have been received Friday March 25, 1994 and the filing was rejected by the appeals court regardless of extending the time for the Appellee to file a response under similar circumstances (case 92-6689).

see also sixth Circuit case docket 92-6689. This Courts jurisdiction is invoked under Title 28, U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C § 1254 (1)

28 U.S.C § 636 (e)

42 U.S.C § 2000e-5

42 U.S.C § 2000-5(g)

UNITED STATES CONSTITUTION:

V AMENDMENT,

VII AMENDMENT.

STATEMENT OF SUBJECT MATTER and CASE :

"MISCONDUCT" Contempt of the Court !!!

28 USC § 636 (e)

This Court 28 USC § 1254 (1)

A Civil action was filed on January 4, 1990 by Oliver Ray Moore ("Moore"), pro se, against RE:Member Data Services Inc. ("re:Member") in the United States

District Court for the Western District of Tennessee, Western Division, Brought pursuant to Title VII of the Civil Rights Act of 1964 for employment discrimination on the basis of race. Jurisdiction was Specifically conferred on the Court by 42 U.S.C. § 2000e-5. Equitable and other relief was also sought under 42 U.S.C. § 2000e-5(g). Yet while in Proceeding towards building a case on the Merits Re:member started actions contrary to the orderly process of discovery in violation of the Law 28 U.S.C § 636 (e). and of the Magistrates un appealed order On Motion to Compel Discovery attached. On August 23, 1991 Moore Moved the court for Order compelling Discovery see order . Among the 15 items to compel were Request for Production No. 9 and request for production No. 5. A Magistrate of the district Produced an ORDER. see Order On Motion to Compel Discovery Docket 109

attached It was Determined by Claim from Re:member that though narrowed that Re:member has produced the comparable employee files request 9 and also must see that Moore gets request no. 5. Re:member did not Appeal this portion of the order Yet only appealed the portion as it relates to request number 8.
On November 22, 1991 a US. District Judge Ruled on all exceptions to the order to Compel discovery. See Docket 128 attached. With exception to request 8 the district Judge Orders Specifically: " In all other respects, the exceptions of the parties to the magistrate judge's order are denied.

IT IS SO ORDERED THIS 19th day of November, 1991. "

This order has not been appealed !!!

It has been found that Re:member data did not produce request number 9 as Claimed to the magistrate as determined

by the magistrate judge nor does Moore have request number 5 or has ever been served request Number 5. We consider this to be misconduct as brought to the review Courts decision . ON December 23, 1991 Moore Moved the District Court for Default Judgement and on December 30, 1991 Moore Moved for protection from a pending summary judgement motion filed by re:member. The Motions were referred to again the very same Magistrate of the district . Re:member in argument yet sworn to be true, another exception and despite all exception are denied by the District Court, Claiming as determined by the magistrate Re:member or its counsel has produced all documents to which it has access. and " accordingly," Moore's motion for default and his motion for sanctions are Denied See order Denying Motion for Default, Motion for Relief, and Motion for Sanctions page 2 par. 2,3 Likewise Page

3, par. 1 indicates "AS has been indicated before, plaintiff now apparently has all the discovery materials requested that can be produced by the defendant." and Further under par. 2 the Magistrate states " Under these circumstances, Plaintiff's Motion for Relief (from summary judgement motion) is DENIED. " The Magistrate of the district Indicates that if certain condition are met as certified by the defendant then discovery is complete and their is no granted protection of the court pursuant to a 56(f) motion application by Moore as of 1-27-92 However Moore Found that Re:members Certification was a malicious Lie and that Remember did have access to addition discovery essential to Moore's Case on the Merits and Moore Obtained Proof of this misconduct. In fact Request for Production Number 9 the entire Employee File of comparable

employees and in a employment discrimination case we think it is essential to identify all comparable employee's. Re:member's Actions have prejudice Moore's case as shown in the reply brief read reply brief here. Their is no doubt that Moore's was preparing a prima facie case baring misconduct of the Re:member. Moore is of the Belief that this order pertaining to the Merits of this case Must be overturned pending further discovery.

First Issue Does the 6th circuit recognize the U.S. districts Courts Order Denying All exceptions except for those that pertain to request no. 8. of the order to compel discovery " un appealed" (FACT1) and the undisputed affidavit (FACT2) submitted that all discovery items are not had or identified attached to the appellant's brief "misconduct"? Second issue, Does the 6th Circuit recognize additional

claims and circumstances "exceptions after 11-22-91 order of the District Court see fact1 " to exempt the Remember from punishment of the court because it claims under oath and penalty of perjury if proved false that Remember has submitted all discovery that it has access too as determined by a Magistrate of the district as of 1-27-92 (FACT3)? In either Case the Respondent was in contempt Does the 6th Circuit ignore the proof of this false claim, an undisputed letter on the very first page after the certificate of service in the appellants brief (FACT4) that discovery was not complete as of 1-27-92 undisputed by the appellee and Moore's affidavit ? Does the 6th circuit ignore the Defendant's appellee's suggestion for relief at docket 151 par 2. allowing Moore more time to answer the summary Judgement Motion because of it's mistake (relief) clear prejudice against the plaintiff ?

See docket 151 @ 2 (FACT5). Moore's default Judgement motion was only denied accordingly that discovery was complete as of 1-27-92 yet fact2, fact 4 and docket entry 150 has proved discovery was incomplete.(FACT6) Moore's Protection from the summary judgement Motion, Fed.R.Civ.P. 56f, was denied only under circumstances that Moore had all the Discovery materials requested that can be produced by the defendant, re:member as of 1-27-92 Yet fact 2, fact 4, and fact 5, shows that re:member did not meet those circumstances. (Fact7) Is The defendant, re:member data due against itself default Judgement. (Fact8) Plaintiff, Moore is due relief from application of summary judgement fact 4, fact 5 and docket entry 150 interlocutory 59e appeal not yet ruled upon.

(FACT9) The defendant is due a civil perjury Judgement against it for its

false claims as determined by the Magistrate that it has submitted all responsive documents that it has access; Magistrate determination date 1-27-92. supported by fact 2, fact 4, fact5, docket 150. The district court case was inadvertently dismissed However on July 1, 1992 the District court reinstated the case likewise ordered Moore, to respond to the pending motion for summary judgement Motion within 10 days at docket 156 However at docket 150 Moore has already made the court aware of re:member's misconduct by a Fed. R. Civ. P. 59(e) Motion still pending docket 150. The Court is also aware that the 56F motion for protection from summary judgement was only denied under circumstances, therefore the circumstance failed and therefore protection must be granted by statute un appealed determination of a magistrate judge. The court has choose to ignore

the docket 150 appeal and move on to 156, Moore was ordered to respond with in 10 days to the Motion for summary Judgement at 156. On July 13, as computed by Civ.R. 6(a) excluding Saturdays, Sundays, and Holidays a Timely appeal was filed, "Motion for Relief from Injustices of the Court Pursuant to Fed. R. Civ. P. 60 (b)(3)" However By determination this 60 (b)(3) for misconduct is to be construed as a 59(e) Motion By 6th Cir Case 92-6689. and is therefore still Pending a ruling from the District Court !!!. On august 10, 1992 the District Court entered an order Dismissing Cause with prejudice which claimed by order of the court Plaintiff was explicitly directed to respond in full to the pending motion for summary judgement within ten (10) days, Which order is still on appeal and not final. Therefore the Petitioner is not yet required to respond to the

Motion for summary judgement pending a ruling on the appeal docket 157 and 150 yet summery judgement is entered without the a response on the merits form the plaintiff. It is further established that misconduct is a ground for relief from judgement of misconduct See appellant's brief page 4 which Specifically States : " It is asked of this court (Sixth Circuit) to upset the order as provided in the notice of appeal on the grounds of Misconduct, That summary Judgement is in appropriate, that their is no protective Motion against proof of contempt and misconduct and default, the Lower Court Abused its Discretion, and The Appellant's Constitutional Rights have been violated. " Therefore (FACT10) The 6th Cir. was made aware additional grounds for relief . In fact we argue that because of Re:members Misconduct which was something newly asserted, the

determinations made as to discovery being complete as of 1-27-92 is void by the facts Yet the facts also prove that the Defendant is Due against itself for its own actions Civil Perjury Judgement and Default Judgement. (FACT11) The Magistrates Order of 1-27-92 was un appealed by Re:member therefore, by Statute Re:member Data shall suffer Civil Perjury Judgement against itself or Default Judgement. Just as the Plaintiff would suffer if discovery was really complete on 1-27-92 When the 6th circuit received notice of appeal from the docket 166 order dismissing cause, appeal of 168 for relief though labeled Pursuant to 60(b)(3) was to be previously Construed by the 6th Circuit as a 59(e) not exceeding toll Motion See 6th Cir. Order 92-6698 attached and therefore remanded back to the District Court to Rule on the motion However should have also ruled on docket 157 not

exceeding toll motion but did not. Upon Ruling and denying relief from Dismissal at docket 176 Moore again Issued a timely notice of appeal at docket 177. On March 8, 1994 a Review Panel of the 6th Cir. inconsistent with authorities and with itself reviewed the appeal as a 60(b)(3) Motion and denied relief as this the case the Sixth Circuit Could have ruled on the First yet abused its discretion. Be cause of the confusion between the two Panels under 92-6689 it's a 59(e) motion, and under 93-5647 of the same circuit it is ruled a 60(b)(3) motion. Therefore rather than asking the panel to rehear the Matter which also relates to another panel as well We sought a Rehearing EN Banc for consistency in a ruling. a Panel determined that our Filing was un-timely and was rejected. By our calculation the petition should have been received on Friday March 25, 1994 and yet was not

received through the mail until Monday March 28, 1994. We do not dispute that the filing was received un-timely only thought the court would be as Just as it has been to the Appellee. However We Do argue that Under Case 92-6689 the Defendant Re:member Did not file a timely Cross-appeal, and to Go even One Step Further Moore proceed to move the Circuit Court without cross-appeal. However, rather than Grant the Motion and undisputed appeal, Ordered the Defendant to Respond to the Appeal. We think that if Moore's En banc petition for rehearing was un-timely and rejected than the Response from Re:member under 92-6689 should also be rejected and the appeal of 92-6689 form Moore Should also be granted for consistencies in the circuit. As a result Moore is Filing this Petition for Writ of Certiorari and asks this court to assume immediate jurisdiction to settle the

Inconsistencies from other Authorities including a Supreme Authority this Court. And also to settle the Inconsistencies of the 6th Cir. amongst itself and preserve the Petitioner's Right to a Trial on the Merits. First of all the Petitioner has acquired over 150 pieces of physical evidence to support his claims in the his initial complaint on the merits Yet the Respondent has foreclosed the full and Fair preparation of the Plaintiff's Case in Violation of the established law of the Magistrate Judge and Statute See United States Code 28 Usc § 636 (e) Specifically sub sections (3) failure to produce, after having been ordered to do so any pertinent document; The discovery process was ordered by the district Judge over on December 20, 1991 and it was determined by a magistrate that on 1-27-92 that discovery was complete therefore also subsection (1)

disobedience or resistance to any lawful order, process, or writ; and subsection (5) any other act or conduct which if committed before a judge of the district would constitute contempt of such court. This Case did not go to a Trial on the Merits Yet Misconduct has been properly brought to the district courts attention at Docket 168 which as striped the Petitioner of is full and fair preparation of a case, it has been further brought to the review Courts attention on page 4 of the appellant's Brief, that the Appellants Constitutional Rights have been violated -- VII AMENDMENT to the CONSTITUTION -- and is now asked that this court assume jurisdiction and administer the proper relief pursuant to Title 28, Section 1254(1).

We believe that the District Court lacked Jurisdiction granting Summary Judgement and dismissing the Pendant

Claims Docket 166 and 167 without having Ruled on Appeal Docket 150 and 157 which will determine whether the Plaintiff, Employee, Petitioner is required to Respond on the Merits of this case by summary . See Docket 150 and 157 Attached not exceeding toll 59e motions, and there fore it is asked that this Court Vacate the summary judgement for an abuse of discretion and lack of jurisdiction.

****

On March 8, 1994 6th Circuit Justices of the review court review Up held the discission of the Trial Court of the Western District of Tennessee SEE ORDER ATTACHED. We think this is Great Err that would Striped the Appellant of its constitutional Right as guaranteed by the VII Amendment. Their is clearly a legitimate Dispute. IN FACT by Law as clearly argued Summary Judgement will be in appropriate if the parties disagree

on the inferences which may reasonably be drawn for from the disputed facts and the burden of proof is on the "moving party" to show the material facts are not in dispute ROCKSTROH V. A.H ROBINS CO. , INC. 602 F.Supp 1259, 1264, 1265 (1985) On summary judgement , the moving party has the burned of proving that the material facts, as presented, are not in dispute and that their can be no reasonable dispute as to the legal conclusions to be drawn from these facts. Adickes v. Dress & Co., 398. 144 157, 90 S.Ct 1598, 160, 26 L.Ed.2d 142 (1970); Morrison v. Nissan Co., Ltd, 601 F.2d 139, 141 (4th cir. 1979); Carroll United Steel workers of America, 498 F.Supp. 976, 978 (D.Md. 1980) In deciding the motion the court must view the facts and the inferences from those facts in the light most favorable to the non moving party. Cole 633 F.2d 1083. 1089 (4th Cir 1980 Even where there is no dispute as to the basic facts, summary judgement will be inappropriate if the parties disagree on the inferences which may reasonably be drawn from the undisputed facts. Morrison v. Nissan Co. Ltd. 601 F.2d 141. First for what this panel calls a 60(b) Motion should be construed as a 59(e) Motion from the order as determined previously by the 6th Circuit See Case 92-6689 6th Circuit Order attached. The review panels determination appears to begin on

page 2 par. 4. Lets Examine the review for Err. First the Justices Moved to assert that Moore alleged facts similar to previous claims that the defendant failed to comply with discovery requests., and then asserts: "nothing new was asserted." Incomplete discovery essential to the plaintiff's case is just that incomplete discovery. There is no need to assert still incomplete, more incomplete, or again incomplete rather Why "Misconduct". We argued because of the Defendants Misconduct that discovery is "again" incomplete So Where is the Appellants Proof see Motion 168 attached our Motion of Reference. Again this court concurs that their exist previous claim(s) That the Trial court is aware of docket 150 and 157 Neither motion has been ruled upon by the Lower courts . These are interlocutory appeals in which the Petitioner is being deprived of process

of the law In violation of the Amendment V of the Constitution of the United States.

On January 27,1992 the magistrate judge of the district produced an order, SEE Order denying Motion for Default, Motions for relief, and Motion for sanctions page 2 par. 2 attached.

"As to Requests number 5 and 9, defendant , through counsel, has stated it has submitted all responsive documents in its possession, or to which it has access, and can find no others. Counsel for defendant has gone one step further and has verified this response, subject to the penalty of perjury. Without proof that counsel for defendant has lied under oath, or that the defendant has violated FED. R. CIV. P 11, this court has to assume that defendant has complied as best it can with the

orders of this court.

Accordingly, plaintiff's motion for default and his motion for sanctions are Denied."

The District Court adopted the agreement and denied all exceptions to the agreement. ****** The Magistrates order was filed 1-27-92 by the time the District court adopted the agreement on 2-28-92 the Defendant had already violated the agreement as proven at docket 150 and 151 never decided. ***** However since we cannot disagree with this arrangement exceptions denied. We Agree and find the established Proof as determined by the Judge that the Defendant has lied under oath, or that the defendant has violated FED R. CIV. P. 11. Therefore by the agreement due to the defendants direct violation, there is due against the Defendant, Appellee Civil perjury Judgement

"Misconduct SEE 28 USC § 636 (e)" After Presenting the Proof to the Trial Court, an un disputed letter, Proof dated 2-7-92 attached to docket 150 request for sanctions, indicating that the defendant did have access to Moore's discovery responses in direct violation of the agreement. This Court should have noticed the defense of the defendant at 151 paragraph 2. attached

> "2. However, Moore's allegations of criminal perjury are malicious lies. All the defendant has done (and will continue to do) is to comply with the requirements of Fed. R. Civ. P. 26(e) regarding supplementation of discovery responses."

This is ridiculous given that this is a civil Case and the Defendant is subject to civil Perjury Judgement by law as adopted by both the district court and the Review court. Furthermore this Defendant claims that it will continue to produce discovery despite the Order, agreement that the defendant had produced all discovery that can be

produced and furthermore produced more discovery materials yet still the Plaintiff, Appellant, Petitioner argues that this response is incomplete. In Fact The Court Should have been aware of the Appellee's suggestion for relief from it's mistake, "Misconduct" docket 151 @ 1. Admitting Prejudice to the Preparation of the plaintiff's case:

> "re:Member Data has no objection to granting Moore an additional 30 days to respond to the Motion for Summary Judgement filed by re:Member Data herein on June 28, 1991, if the court so desires.

The Plaintiff, appellant has also asked to go back to discovery proceedings to perhaps solve the issue Yet if this Court adopts the magistrate's order "discovery complete and proof otherwise brings perjury judgement as of 1-27-92" and upholds the trial court, and review court's decisions to concur then the Plaintiff, appellant-petitioner Demands that A Civil Perjury Judgement be entered against the Appellee, Respondent

as is Just and by LAW the un appealed established law from the Magistrate Judge Furthermore "Moore" is Due a favorable Default Judgement interlocutory Motion denied only if accordingly to specific terms . Conditions failed therefore Plaintiff, Petitioner is Due a favorable Default Judgement or hearing and has been deprived process of the law See Amendment V of the constitution of the United States. More so at the very least vacate the judgement of the trial court by summary and the dismissal of Action.

Likewise, what does this 2-7-92 discovery response from the defendant do to the underlying Motion for default judgement which the Magistrate was ruling? The Magistrate states: "Accordingly, plaintiff's motion for default and his motion for sanctions are DENIED." The Plaintiff, Appellant has

argued that this Court erred in that at 150 their is proof that discovery issues remain un ruled upon "Default Judgement" and was erroneously decided only upon what the Defendant falsely claimed to be the truth. For example if the defendants claim of complete discovery is true as determined by the magistrate Judge on 1-27-92 then accordingly Plaintiff's Motions are denied however if proved false then Perjury Judgement, or default Judgement (Default Motion Affirmed) as well as charges of contempt. At docket 150 the Plaintiff, appellant has shown Proof that discovery was not and is not complete per Magistrate determination, it was further established on the very first page beyond the certificate of service in the appellants Brief. The plaintiff, appellant, petitioner has shown this court that as of 1-27-92 discovery was not complete via agreement as determined

by Magistrate and adopted by Trial Court and upheld by the Review Court Reminder to this court the Proof is undisputed in fact the Defendant's Claim to the effect at docket 151 in direct contravention to the order, agreement, and despite Previous Claims that it has produced all discovery request that it could access, will continue its evil actions see 151 @ 2 furthermore which brings us back to what degree is discovery complete. Again incomplete, Still incomplete, More incomplete, all would be acceptable yet rather incomplete or failure to produce materials in discovery should suffice and the answer why? "misconduct" . Trial court was at docket 168 when it made its determination that "nothing new was asserted" However at docket 150 and 151 proof was pending actions already established before the court of perjury "misconduct" and incomplete discovery. yet at 168 some 18 entries later is

additional proof needed? In Fact the Defendant did not dispute the proof at 150 only stated that it did not commit Criminal Perjury, Nor did it's dispute the proof in the appellants brief therefore "Still Incomplete" or additional proof should not seem necessary. On page three of the review Court determination the court claims that the Magistrate has denied all motions challenging the completeness of discovery Even this is not true because according to the Magistrates 1-27-92 order denying default judgement, it was only denied without further proof of "misconduct" See Magistrates order attached However the Magistrate cannot deny the facts. 1. Their is an outstanding un vacated order to compel discovery request no. 5 . 2. The Trial Court Denied all exceptions to the Magistrates Order on Motion to Compel Discovery docket 128 attached. 3. The

exceptions to the trial court order are un appealed. 4. It is undisputed in the trial Court that the Defendant has not produced the document as ordered. 5. Before the Review Court their is an un disputed Affidavit indicating the Plaintiff, Appellant does not have discovery documents requested and not appealed. 6. The Review court has been asked to sanction the Appellee.

The lower courts have discretion as to deny motions which challenge the completeness of discovery however by the facts/merits of this appeal yet their is error and abuse of discretion not of the magistrate who has established the law yet the trial court and the review court should be properly reviewed for adopting the portion indicating complete discovery yet rejecting the Plaintiff undisputed facts of misconduct and the penalty as determined by the same order of the magistrate for the " Appellee's

Misconduct" and proof of failure to carry its burden that material facts are not in dispute therefore entering Perjury Judgement and over turning summary judgement. Continuing on page 3 of the review courts determination. It appears that the review court is in agreement with the trial court that the magistrates order of 1-27-92 should stand Moreover the Provisions of proof "misconduct" any violation of the agreement also should be adopted as well subject to penalty of perjury as determined by the magistrate of the district un appealed by the defendant and unvacated. Next the Review court expresses to the effect that A rule 60(b) Motion or 59(e) motion must be denied if it is merely an attempt to re litigate previously decided issues and as far as the trial court was concerned, the issue of discovery was complete therefore baring any new grounds the

Trial court was within its considerable discretion. However if We look at the August 17, 1992 Motion docket 168 attached the Plaintiff did offer NEW GROUNDS NEVER DECIDED namely :"Misconduct" Specifically: " Comes now the Plaintiff, Oliver Ray Moore, ProSe, pursuant to Fed. R. Civ. P. 60(b)(3) and moves this court for relief from judgement and order filed in this court on August 10, 1992, on the grounds that the defendant's, Misconduct ..., has foreclosed the full and fair preparation of the Plaintiff's Case, and that summary judgement is inappropriate. See Motion 168 attached. Therefore the trial court was aware that a new ground was misconduct. Even further in the appellant's Brief This Ground of misconduct was also argued See appellant's brief specifically Page 4. The Plaintiff, Appellant sees no defense or authority sufficient to over turn

it's claims misconduct as grounds for relief in the appellee brief. In fact both the 1st Cir., the 5th Cir and this Supreme court also agree that relief from order, final judgement is proper - Anderson v. Crayovac inc. see appellants brief page 22 In the Appellants Brief the Appellant has shown that despite perjured Claims that the appellee, Employer has failed to produce documents in discovery and has ignored several proceedings of the district court showing misconduct and further whether this misconduct is for evil, innocent or careless purposes employer should not be immune from our application as brought out in the appellants brief on page 22 and more so as brought to the review courts attention by Law Anderson v. Crayovac, Inc, 862 F.2d 910 923 (1st Cir. 1988) In relevant part, Rule 60 state: On Motion and upon such terms as are Just. the Court may relieve a party from a final judgement. Order, or proceeding for the following reasons: (3) fraud

(whether heretofore denominated intrinsic or extrinsic), Misrepresentation, or other misconduct of an adverse party.... Fed.R.Civ.P 60(b)(3) Failure to disclose or produce materials requested in discovery can constitute "misconduct" within the purview of this subsection. See Roier v Ford Motor Co., 573 F.2d 1332, 1339 (5th Cir. 1978). "Misconduct" does not demand proof of nefarious intent or purpose as prerequisite to redress. For the Term to have meaning in the Rule 60(b)(3) context. it must differ from both "fraud" and "misrepresentation" Definition of this difference requires us to take an expansive view of "Misconduct." The term con cover even accidental omissions elsewise it would be pleomastic, because "fraud" and "Misrepresentation" would likely subsume it. Cf. United States v. One Douglas A -- 26b aircraft, 662 F.2d 1372, 1374-75 n. 6 (11th Cir 1981 (to avoid redundancy, "Misrepresentation" in Rule 60(b)(3) must encompass more that false statements made with intent to deceive) We think such a construction not overly harsh; it takes cant imagination to conjure up discovery responses which, thought made in good faith, are so ineptly researched or lackadaisical that they deny the opposing party a fair trial. Accidents at least avoidable ones -- should not be immune from the reach of the rule. Thus we find ourselves in agreement with the Fifth Circuit that., depending upon the circumstances, relief on the ground of misconduct may be justified "Weather there was evil innocent or careless, purpose. "Bros. Inc. v. W.E. Grace Manfactruing Co., 351 F.2d 208, 211 (5th Cir. 1965) cert denied 388 U.S. 936. 86 S.Ct 1065, 15L.ED.2d 852 (1966). Up held by this

Court Therefore Misconduct has been clearly our grounds for relief and it is asked this court to over turn opinion based on the newly asserted ground. Furthermore we believe that the District Court did not act within its considerable discretion by denying relief and Further more we find the 6th Cir's. Ruling inconsistent with the several authorities Cited including the supreme Courts decisions And ask this Court to correct this matter. Further We believe if the Respondent does not dispute the Fact that discovery is incomplete see affidavit Attached to appellant's Brief, Clearly By Authorities cited that incomplete discovery makes summary judgement inappropriate Note the Defendant, Appellee, Respondent did not Appeal Order Compelling Request 5 and Request 9. therefore SEE Also SNOOK 859 F.2d 865,870 871,and more specifically 872

(11th Cir. 1988)

This court has recently considered the application of Colotex, and other recent Supreme Court Cases to cases in which the non-moving party has not had an adequate opportunity to conduct discovery. In WSB-Tv V. Lee we reviewed the Supreme Courts decisions in Colotex, in Anderson v. Liberty Lobby, Inc. 447 U.S. 242, 106 S.Ct 1348. 89 L. Ed 538 (1986). We conclude that the common denomination of the three cases is that "summary judgement may only be decided upon as adequate record" 842 F.2d at 1269. Because the Plaintiffs in WSB-TV had been afforded not opportunity for discovery we held that consideration of the defendants Motion for Summary Judgement was erroneous.

This court has often noted that summary judgement should not be granted until the Party opposing the Motion has had adequate opportunity for discovery . E.B., Littlejohn v. Shell Oil Co., 483 F.2d 1140, 1145 (5th Cir. 1973)(en banc.) cert denied. 414 U.S. 1116, 94 S.Ct 849, L.Ed.2d 743 (Noting the facts have been fully developed): Alabama Farm Bureau Mutual Casualty Co. V. American Fidelity Life Insurance Company, 606 F.2d 602, 606 (5th Cir 1979). cert denied 449 U.S. 820, 101 S.Ct 77, 66 L.Ed.2d 22 (Summary Judgement should not, therefore, ordinarily be granted before discovery has been completed. ") Murrell v. Bennett. 615 F.2d 306, 310 (5th Cir. 1980) (Citing Alabama Farm Bureau). The party opposing a motion for summary judgement has a right to challenge the affidavits and other factual materials submitted in support of the Motion by conducting sufficient discovery so as to enable him to determine whether he can furnish opposing affidavits. Parrish v. board of

commissioners of the Alabama State Bar. 533 F.2d 942, 948 (5th Cir 1976) If the documents or other discovery sought would be relevant to the issue presented by the motion for summary judgement, Opposing party should be allowed the opportunity to utilize the discovery process to gain access to the requested materials. Id. Generally summary Judgement is inappropriate when the party opposing the motion has been unable to obtain responses to his discovery request Cowen v. J.C. Penney Company Inc. 790 F.2d 1529,1532, (11th Cir 1986)

The issue of inadequate discovery was called to the district court's attention by the parties in their briefs addressed to the Motion to compel . and In their Response to the Plaintiffs motion to compel. defendants asserted that a ruling in their favor on the pending motion to dismiss or for summary judgement would render moot any discovery issue. Plaintiff responded to this assertion by reminding the district court that "Motions for summary judgement are premature and should not be granted until the Party opposing such a motion is permitted to make discovery essential to his case" Therefore, the district court should have been aware of the Plaintiffs' contention that they had not been able to obtain, through discovery, evidence essential to their opposition to the Motion for summary judgement. The discovery request was clearly relevant the pending motion for summary judgement. The discovery request was clearly relevant the pending motion for summary Judgement, both as the securities fraud and RICO counts. We therefore REVERSE the district court's order granting summary judgement in favor of the defendants and

dismissing the pendant claims, and REMAND the action for further Proceedings not inconsistent with this opinion. SEE COWEN 790 F.2d 1529,1532 and specifically 1533 (11th Cir. 1988). We Find that summary judgement was improper as a matter of law on the record of this case. We therefore REMAND the Case to the district court for trial on the merits. SEE Parish, 533 F.2d 942,948 (5th Cir. 1976). WE conclude that the trial court erred in entering a summary judgement without having required the defendants to make available for inspection as requested by the Plaintiffs the examination of papers and graders' note if any for the year 1973. the Judgement of the Trial Court is REVERSED and REMANDED for further Proceedings not inconsistent with this opinion.

If the Respondent disputes the facts discovery is incomplete then the Other rules apply: is the Respondent subject to Default Judgement, is the Respondent subject to Civil Perjury Judgement, is the Petitioner's Fed. rule 56F Motion for protection from summary judgement granted if there are no circumstances to deny the motion. Is the Respondent found in Contempt by Law or statute. Is the Petitioner Due his discovery responses as the District Court Denied All exceptions and has submitted un

disputed affidavit that responses are outstanding. Does the Respondents Misconduct make discovery incomplete. Discovery is complete if Re:member has not lied or violated Fed. Rule 11. Or docket 128 attached no exception to the order to compel discovery. All of the above are un settled genuine issues of ultimate Facts that are now or are to be argued not at summary judgement rather before the court or at trial See Appellants Brief.. Which are argued by several different legal rules and supporting facts. The lower Courts tend to put more emphasis on arguments rather than the facts in evidence. However we concur with the higher Courts that even where the facts in evidence are undisputed, summary judgement is inappropriate where the evidence, see undisputed affidavit attached to the Appellants Brief and the order compelling discovery items is such that

conflicting inferences may permissibly be drawn therefrom and that any inferences to be drawn from the facts contained in the record must be view in a light most favorable to the party opposing the motion for summary judgement. SEE. FEDERAL. AND LOAN INS. CORP V. WILLIAMS 599 F.Supp. 1184, 1195, 1196 (1984) A motion for summary judgement may not be granted if there is a genuine issue of material Fact See Wight Miller, and Kane, 10 Federal practice and Procedure: Civil 2d & 2712, at 574 (1983). It is improper for this court to decide the applicability of the legal rule. On a Motion for summary judgement if materials before the Court raise the genuine issue as to the ultimate facts Material to the applicability of the legal rule. United States v. Diebold, 369 U.S at 665, 82, S.Ct 994 Summary Judgement is not a substitute for trial for Disputed factual issues Wright, Miller and Kane, 10 Federal Practice and Procedure: Civil 2d$ 2712 at 574 (1983) citing Richard Colgin Co. V. Diamond Crystal Salt Co.., 32 F.R.D. 44. 45-46 (D.N.C. (1963) and any inferences to be drawn from the facts contained in the record must be viewed in light most favorable to the party opposing the motion for summary judgement. United States V. Diebold, 369 U.S at 665, 82 S.Ct 994 See Adickes. 398 UsS At 144, 90 S.Ct at 1589; Cole 663 F.2d at 1090 Even where the facts in evidence are undisputed summary judgement is inappropriate where the

evidence is such that conflicting inferences may permissibly be drawn therefrom. United States v. Diebold, 369 U.S. at 665, 82 S.Ct. 994: Phoenix Savings and Loan v. Aetna Casualty and Surety Company, 381 F.2d 245, 249 (4th Cir. 1976): Batchelor v. Legg, 55 F.R.D. 557, 561 (D.Md.1972). We belief the lower courts reviewed the inferences most favorable to the Moving Party in err. We also believe that as of 1-27-92 that their is clearly a legal dispute as to whether discovery is complete. We believe that the Defendant's response of 2-7-92 and the un appealed affidavit 3-1-93 of the Appellant attached to the Appellant's brief is proof that discovery was incomplete as of 1-27-92. Furthermore the Appellee has failed to carry its burden. See ROCKSTROH V. A.H. ROBINS CO.,INC. 602 F.Supp. 1259, 1264, 1265 (1985)

On Summary judgement, the moving party has the burden of proving that the material facts, as presented, are not in dispute, and that the material facts, as presented, are not in dispute, and that their can be no reasonable dispute as to the legal conclusions to be drawn from these facts. Adickes v. Dress & Co., 398 U.S. 144, 157, 90 S.Ct 1598, 1608, 26

L.Ed.2d 142 (1970); Morrison v. Nissan Co., Ltd, 601 F.2d 139, 141 (4th cir.1979); Carroll United Steel Workers of America, 498 F.Supp 976, 978 (D.Md.1980). In deciding the motion the court must view the facts and the inferences from those facts in the light most favorable to the non moving party. Cole 633 F.2d 1083, 1089 (4th Cir 1980) Even where there is no dispute as to the basic facts, summary judgement will be inappropriate if the parties disagree on the inferences which may reasonably be drawn from the undisputed facts. Morrison v. Nissan Co. Ltd. 601 F.2d 141.

The Petitioner has been Stripped of its Rights as Guaranteed by the V Amendment to the Constitution of the United States thus far. By the Lower Courts not addressing fully or properly outstanding interlocutory appeals, motions and it's grounds of misconduct. The Petitioner is of the belief that he is Specifically Deprived of his naturally occurring Default Judgement and other process as due by law, See docket 128, which eliminates exceptions and undisputed affidavit of the appellants brief, appellants brief page 38, Specially Relief Sought :

"Comes Now the Employee, Oliver Ray Moore, Plaintiff, Appellant and ask that this Court Overturn the United states District Courts Order Denying Motion for Relief for ...gement Docket entry 176 and adj dge the Defendant, Appellee for Contempt(reference 28 USCS § 636(e)). Yet withstanding the argument for contempt, enter a default Judgement against the defendant pursuant to Motion for default Judgement and no protective orders; Yet withstanding arguments of contempt and default judgement, adjudge the Defendant for perjury, which the magistrate determined to be the penalty if their is proof that discovery is not complete as of 1-27-92 (pursuant to Order Denying Motion for Default, Motion for Sanctions, and Motion for Relief page 2 paragraph 2); Yet withstanding Contempt, default judgement, and perjury arguments, reopen this case for further proceedings and discovery, to assure that the Appellant gets all documents Ordered Produced in discovery, references docket entry 128."

All of which are outstanding issues, inferences, motions and appeals, abuses of the Courts Discretion (due Process)- depriving liberties of the Petitioner.

REASONS FOR GRANTING THE WRIT:

(1)There is Presentence around the

country and with this court that Misconduct, failure to disclose or produce materials in discovery is grounds for Relief from final judgement, order, or proceeding. See Anderson v. Crayovac, Inc page 22 as applied in the appellants brief. Yet the Review Court did not consider Moore's application on the ground of Misconduct nor Hear arguments of just relief on these grounds in violation of the Petitioners Constitutional Rights, V Amendment-due process of appeal, and the VII Amendment-preserve Petitioners right to trial of controversy it is ask for this court to grant Certiorari and allow relief consistent with the law above.
(2) The Respondents Misconduct was a malicious lie to the magistrate Judge of the district see docket 150 and its failure to produce or disclose material in discovery despite order denying Exceptions to respondents Motion to

Compel discovery by the district Judge and then continue to argue exceptions to the magistrate Judge for sympathy despite the unappealed ruling of the district judge is misconduct Moreover even it's Claim to the Magistrate was not true subject to perjury or an affirmed motion for default judgement for Petitioner. Further more the Respondent did not Move the Court for Protection pursuant to Fed Rule 26c prior to rule 37d motion for default judgement and their should not be any protection of the court. The Magistrates Rules that discovery is complete accordingly to terms determined by the magistrate yet terms were broken and that Protection from summary judgement is granted under circumstances determined by the magistrate yet circumstances failed and how fed. rule 37d is to by applied or fed. rule 11 is to be applied or the civil perjury rules

apply to this case are pending ruling. It is improper for this court to decide the applicability of the legal rules, on a motion for summary judgement if materials before the court raise the genuine issue as to the ultimate facts Material to the applicability of the legal rule See Page 6 of the appellee's brief. United States V. Diebold. 369 U.S at 665, 82, S.Ct 994. page 6 appellee brief. The inferences drawn from the facts contained were not viewed in light most favorable to the party opposing the motion for summary judgement United States v. Diebold, 369 U.S. at 665, 82 S.Ct 994 See Adickes, 398 U.S. at 144, 90 S.Ct. at 1589: Cole 663 F.2d.at 1090. The lower court Abused its discretion.

(3) The Respondent making an additional discovery response after the magistrate determined that discovery was complete verified and subject to the penalty of

perjury as of 1-27-92 was misconduct and therefore, by the facts discovery was not complete and establishing the application of law which is precedent around the country that generally summary judgement is inappropriate if discovery is incomplete, furthermore the District Judge has already Denied all Exceptions to the Magistrates Judges Order on motion to compel discovery, un-appealed. SEE undisputed Affidavit of outstanding discovery attached also attached to appellants brief.

(4) A response to motion for Default Judgement is not the place for the employer to argue appeals to the District Judges Order Denying Exceptions to the Magistrates Order on motion to compel Discovery since the District Judges order was Un appealed by the employer. The Magistrate Judge Lacks jurisdiction to exempt the employer from any of the items ordered compelled

pending an appeal of the District Judges previous determination

denying exceptions. Therefore fact: Request for production number 5, has not been served on the Plaintiff, Petitioner and the plaintiff, Petitioner does not have this Item requested as ordered. Furthermore, the Plaintiff, petitioner cannot identify any response to resemble request number 9 served from the respondent. Therefore according to the US districts Judges Order See entry 128 and the undisputed affidavit the Defendant, Respondent is in Default established by jurisdiction of the district Judge and un-appealed bound by law(statute).

In the Appellants Reply Brief the Appellant Showed that it was making great effort to make a case on the merits see appellant's Brief in fact the Appellant has accumulated over 150 pieces of physical evidence to support

it's Claims. The Merits are of Most importance Furthermore the Appellant has shown that not having a full discovery, all items ordered compelled would prejudice the plaintiff's case. According to the Determination of the magistrate of 1-27-92 the Employer does not have in its possession, or access to request No. 5 and request No. 9. If This Determination Stands the way written This CASE IS One OF THE GREATEST MISCARRIAGES OF JUSTICE EVER !!!!! Request No. 9 IS THE EMPLOYMENT FILES OF ALL COMPARABLE EMPLOYEE'S. IN This Case of Employment Discrimination Where We are required to compare employees at trial or if summary employee records in files, facts, evidence, WE do not believe that the Employer does not have access or not have in it's possession the Employee Files Request No. 9. as determined verified and subject to the penalty of perjury as of 1-27-92 by the

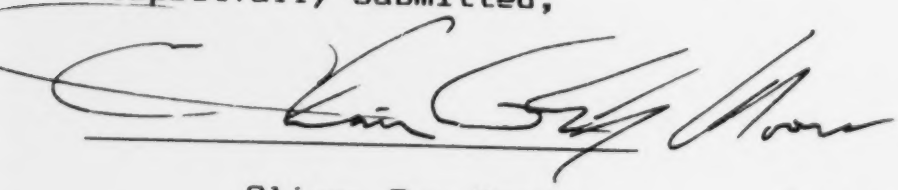
magistrate judge It is further Ridiculous that a Magistrate Judge would order discovery complete in an employment discrimination case without the comparable employee files produced and remove protection from the employee pursuant to Fed. Rule 56(f), non-moving party to a pending summary judgement motion and require that the Burden of proof be on the non-moving party to a motion for summary judgement to provide proof that discovery is still incomplete or the material facts are in dispute demonstrating that it favors the inferences of the Moving party. Furthermore the U.S. District Judge has already denied exceptions to the Files ordered Compelled to be produced as to this request and un appealed. Next the Plaintiff, Petitioner has shown the necessary inferences, proof, facts to overturn a summary Judgement by the Defendant, Respondents Misconduct. We

Pray that the Writ of Certiorari be granted and the Petitioner relieved of these abuses of discretion.

CONCLUSION:

For the reasons set forth above a Writ of Certiorari Should issue to review the Judgement and Opinion of the court of Appeals in this matter.

Respectfully Submitted,



Oliver Ray Moore Dated: 6-16-94

If this Court elects not to address the issues presented in this Writ at the Present time, It is Requested that the Writ issue and that the matter be

remended to the Court of appeals for redetermination in light that the Appeals Court did Not Consider Grounds of Misconduct and other Equitable relief Requested and the Petitioner would be deprived of its liberty and should receive Due process of the Law V Amendment to the Constitution.

Supreme Court, U.S.
FILED

94 305 JUN 3 1994

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

TERM October 1993

OLIVER RAY MOORE, Petitioner

VS.

MEMBER DATA, Respondent

PETITION FOR WRIT OF CERTIORARI
SUPPLEMENTAL APPENDIX

TABLE OF CONTENTS

order		page
1	Mandate CASE Sixth Cir. 93-5647	3
2	Sixth Cir Determination 93-5647 rejecting rehearing enbanc	3
3	Sixth Cir Determination 93-5647	4
4	Sixth Cir. Determination 92-6689 Contrued as Fed.R.Civ.P. 59(e)	9
5	District Court Entry 177 - Notice of Appeal & Cause for Appeal	11
6	District Court Entry 176 - Order Denying Motion for Relief from Judgement	12
7	District Court Entry 168 - Motion for Relief from judgement	13
8	District Court Entry 167- Judgement in a Civis Case	15
9	District Court Entry 166 - Order Dimissing Cause with prejudice	16
10	Evidence of MISCONDUCT-FACT 4	21
11	District Court Entry 145 - Order Denying Motion for Default, motion for relief, and Motion for sanctions	23
12	AFFIDAVIT of Oliver Ray Moore - Proof of Incomplete Discovery	26
13	ORDER ON MOTION TO COMPEL DISCOVERY	28
14	District Court Entry 101 - Order of Reference. (Guidelines for appeal)	32

TABLE OF CONTENTS CONTINUED

order		page
15	District Court Entry 128 - Order on Parties' Exceptions to Order on Motion to Compel Discovery	32
16	Order On Motion to Extend Time Filed November 22, 1991	34
17	District Court Entry 126 - Order Denying Motion for appropriate Sanctions	36
18	District Court Entry 137 - Order Denying Plaintiff's Exceptions to Magistrates Order	38

United States Court of appeals for the Sixth Circuit No. 93-5647 Parties Oliver Ray Moore Plaintiff, appellant; Member Data, Defendant, appellee; Travelers Express, Defendant. MANDATE:

Pursuant to the Courts disposition that was filed 3-8-94 the mandate for this case hereby issues today

Filed April 18, 1994

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT NO. 93-5647.

ORDER:

"Upon consideration of the Pro se appellant's untimely petition for rehearing en banc, It is ORDERED that the petition not be accepted for filing."

Filed April 14, 1994

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT NO. 93-5647

Entry Date March 8, 1994

ORDER:

"Oliver Ray Moore appeals a district court order denying his motion for relief from judgement filed under Fed. R. Civ. P. 60(b)(3), in this action filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e, et seq. The case has been referred to a panel for the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed.R. App. P. 34(a).

Moore Sought reinstatement and damages in this suit alleging that he had been discharged on the basis of his race from his position as an Installation Specialist with the defendant corporation. On June 28, 1990,

Moore filed and amended complaint seeking to add Travelers Express Company, Inc. (Travelers Express), and Custom Computer Application, Inc. (CCA), as defendants. On July 9, 1990, the district court entered an order allowing the amendment. The district court subsequently dismissed Travelers Express and CCA in an order entered January 18, 1991.

On June 28 1991, the defendant moved for summary judgement, based on evidence that the discharge was because: (1 Moore never demonstrated technical competence with the computer software and hardware he was installing, 2) every customer credit union where he worked complained about he performance, 3) his co-worker had asked that they not be assigned to work with him, and 4) he disobeyed direct instructions and caused serious administrative problems. The district court granted defendant's

motion in order filed August 10, 1992; judgement was entered August 17, 1992. On August 17, 1992, Moore filed his motion for Relief from judgement Pursuant to Fed. R. Civ. P. 60(b)(3) on the basis that discovery was not complete and summary judgement was therefore, inappropriate. the district court denied the motion in an order entered April 5, 1993. This timely appeal followed.

This court reviews the April 5, 1993, order to determine whether the district court in its discretion in denying Moore relief under Rule 60(b). In re Salem Mortg. Co., 791 F.2d 456, 459 (6th Cir. 1986); Smith v. Secretary of health and Human Services, 776 F.2d 1330, 1332 (6th Cir. 1986); Windsor v. United States Dep't of Justice, 740 F.2d 6,7 (6th Cir 1984)(per curiam). The Underlying Judgement is not reviewed. An abuse for discretion exists when the

reviewing court is firmly convinced that a mistake has been made. See In re Bendictin, 857 F.2d 290, 307 (6th Cir. 1988), cert. Denied, 488 U.S. 1006 (1989);Schrand v. Federal Pac Elec. Co., 851 F.2d 152, 156-57 (6th Cir. 1988).

Upon review we conclude that the district court did not abuse its discretion by denying Moore's motion for relief from judgement filed pursuant to Fed.R. Civ.P 60(b)(3). Moore's 60(b)(3) Motion alleged facts similar to previous claims that the defendant failed to comply with discovery requests; nothing new was asserted. A magistrate judge determined on January 27, 1992 that, that Moore "ha[d] all the discovery materials requested that can be produced by the defendant" and Denied all motions challenging the completeness of discovery. the findings of the magistrate judge were adopted by order of the district court entered February

28, 1992, and each of Moore's exceptions to the magistrates judge's order was denied. A Rule 60(b) Motion must be denied if it is merely an attempt to re litigate previously decided issues. See Manstini v. American Tel & Tel. Co., 369 F.2d 378, 379 (2d Cir 1966), cert denied, 387 U.S. 933 (1967). The District court was well Satisfied, in the first instance, that discovery was complete. Because Moore did not offer any new grounds to justify relief but sought only to re litigate issues already decided, the district court acted within its considerable discretion by denying relief.

Accordingly, the district court's order is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit."

Filed March 8, 1994

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT NO. 92-6689

ORDER:

"This Matter has been referred to a panel of the Court. A review of the record indicates that the judgement of the district court was filed August 13 and entered August 17, 1992. A motion for relief from that order was served and filed August 17. The notice of appeal was filed on September, 4 1992.

This Court lacks Jurisdiction in this appeal. The motion for relief was served within 10 days of entry of the decision as calculated pursuant to Fed.R.Civ.P. 6(a). Because the Motion is construed as a Fed.R.Civ.P. 59(e) motion, it tolled the appeal period as provided by Fed R. App.P. 4(a)(4). See Moody v. Pepsi-Cola Metro. Bottling Co., 915 F.2d 201, 206 (6th Cir. 1990); Kennedy v. City of Cleveland, 797 F.2d 297, 304-05 (6th Cir. 1986), cert.

denied 479 U.S. 1103 (1987); Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 40-41 (2d Cir. 1982). A notice of appeal filed before disposition of a time tolling motion has no effect. A new notice of appeal must be filed within the prescribed time from the entry of the order disposing of the Motion. Osterneck v. Ernst & Whinney, 489 Uls. 169, 173-74 (1989); Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982)(per curiam). The August 17 motion has not yet been ruled upon.

Accordingly, it is ORDERED that the appeal be, and it hereby is, dismissed for lack of jurisdiction. Rule 8(a), Rules of the Sixth Circuit."

Entered and Issued as Mandate July 9, 1993.

UNITED STATES COURT OF APPEALS - SIXTH CIRCUIT NO. 93-5647

District Court Entry: 177

NOTICE OF APPEAL & CAUSE FOR APPEAL:

"Comes Now the Plaintiff, Oliver Ray Moore, and to declare to this court A NOTICE OF APPEAL to Order entered in the United States District Court for the Western District of Tennessee Division as follows:

1. ORDER DENYING MOTION FOR RELIEF FROM JUDGEMENT DOCKET 176."

[CAUSE]

" The District Court Justice Lacks Jurisdiction to Rule on Motion while the sixth Circuit Court has Jurisdiction. The District Court Abused it's discretion. The district Court did not Seek leave to adjudge motion. Arguments are already before the Sixth Circuit Court of Appeals under CASE 92-

6689, still pending at this time. The District Court Justice has deprived the Plaintiff's appellant's rights as guaranteed by the constitution of the United State, the VII Amendment. Their are conflicting inferences. Their are Misconduct and outstanding penalty of perjury against the defendant. Summary Judgement is inappropriate. Sanctions are due the defendant. "

Entered May 3, 1993

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

DISTRICT ENTRY 176

Filed: April 5, 1993

ORDER: ORDER DENYING MOTION FOR RELIEF FROM JUDGEMENT

"This matter is before the Court on

plaintiff Oliver Ray Moore's motion for relief from the August 10, 1992, judgement of this Court dismissing the above-referenced case with prejudice. This motion is made pursuant to Federal Rule of Civil Procedure 60(b)(3) and requests that the previous order be vacated ant the case reopened for further proceedings and discovery. This motion does not raise and additional issues not already considered and rejected by the Court and is therefore, Denied.

SO ORDERED this 2 day of April, 1993"

Entered April 5, 1993.

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

Motion Filed By Plaintiff:

District Court entry 168

Title: Motion for Relief from judgement

of Court Pursuant to Fed. Rule. Civ. P. 60(b)(3).

" Comes Now the Plaintiff, Oliver Ray Moore, ProSe, pursuant to Fed. R. Civ.P. 60(b)(3) and Moves this court for relief form judgement and order filed in this court on August 10, 1992, on the grounds that the defendant's Misconduct, failure to disclose or produce materials requested in discovery, has foreclosed the full and fair preparation of the Plaintiff's case and that summary judgement is inappropriate. Whereas the Plaintiff Prays the that the Plaintiff be relieved from final judgement and DECREE and that the Order which Grants the Defendant's Motion for summary judgement be vacated and the order to dismiss this case with prejudice be vacated and deny the application for summary judgement and reinstate-reopen this case for further proceedings in

discovery."

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TENNESSEE

District Court entry: 167

JUDGEMENT IN A CIVIL CASE: CASE NUMBER 90-2005-M1/A

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the order entered August 10, 1992, this case is hereby DISMISSED

with prejudice.

Entered August 13, 1992

UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF TENNESSEE

ORDER

DISTRICT COURT ENTRY 166

ORDER DISMISSING CAUSE WITH PREJUDICE.

This matter is before the Court on Motion of the defendant for Summary judgement filed on June 28, 1991, and the motion of the defendant for entry of an order granting summary judgement filed on July 28, 1992. Rule 8 of the Local Rules provides, under subsection (a), that responses to motions and supporting memoranda shall be filed within ten (10) days after service of

the motion. Rule 8(b) further states that "failure to respond timely may be deemed good grounds for granting the motion."

By order of the Court dated July 1, 1992, Plaintiff was explicitly directed to "respond in full to the pending motion for summary judgement within 10 days of entry," and notified that failure to do so would result in granting of the motion for summary judgement and dismissal of this case." since that time, the plaintiff has filed four additional motions which have been carefully reviewed by the court, among them a motion entitled "Response to RE:Member DATA (sic) Services Inc.' (sic) Motion for entry of order Granting Summary Judgement."

However, Plaintiff's response fails to address the defendants motion, and merely reiterates previous claims that the defendant has "failed to cooperate

in proceedings of discovery" as to plaintiff's Requests for Production number 5 and 9, and restates plaintiff's request for sanctions. The magistrate Judge determined on January 27, 1992 that, the plaintiff "ha[d] all the discovery materials requested that can be produced by the defendant, and denied all motions challenging the completeness of discovery. The findings of the magistrate judge were affirmed by order of the Court entered on February 28, 1992, and each of the plaintiff's exceptions to the magistrate judge's order were denied.

Defendant re:Member Data asserts that Oliver Ray Moore was Discharged not the basis of his race, but "because his work was not acceptable based upon company standards or norms." In defendant's motion for summary judgement, defendant sets out the facts that Moore was discharged because he

never demonstrated technical competence with the computer software and hardware he was installing (Affidavit of Sheryl Bombarry, @4; Exhibit b-1 to Affidavit of Sheryl Bomberry; Affidavit of Mark Walker, @8), every customer credit union where he worked complained about his performance (Affidavit of Mark Walker, @15 Affidavit of Sheryl Bomberry @4), his co-workers had asked that they not be assigned to work with him (Affidavit of Mark Walker, @19; Exhibit A-6 to Affidavit of Mark Walker), and he disobeyed direct instructions and caused serious administrative problems (Affidavit of Mark Walker, @7; Affidavit of Sheryl Bomberry, @5-6; Exhibit B-1 to Affidavit of Sheryl Bomberry, page 1; Exhibit D-1 to affidavit of Woodfrin G. Hays).

An adverse party may not rest on the mere allegations of the complaint but must respond by affidavit setting

forth specific facts showing that there is a genuine issue of fact for trial. Federal Rule of Civil Procedure 56(e). Rule 56(e) specifically goes on to provide "if the adverse party does not so respond, summary judgement, being appropriate shall be entered against the adverse Party."

Plaintiff has failed to submit a controverting affidavit on the issue of the performance-based grounds for discharge established by the defendant or offer evidence supporting a finding of racially discriminatory discharge. Therefore, it is established that Oliver Ray Moore was Discharged from his position as an installation specialist due to unacceptable job performance and not because of his race, and therefore, summary judgement should be entered.

Notwithstanding numerous extensions of time, plaintiff has merely repeated his exceptions to prior discovery

determinations and has failed to submit an appropriate response to defendant's motion for summary judgement as ordered by the Court. Plaintiff's claims regarding discovery were previously denied by the magistrate judge and affirmed by this court, and further exceptions to the magistrates judge's discovery order are not well taken.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that defendants's motion be, and is hereby GRANTED, and that this cause be, and is hereby, DISMISSED with prejudice.

SO ORDERED this 7th day of August, 1992."

Fact Number 4

Attachment to District court entry 150.

Attachment to Appellant's Brief - Case 93-5647

Title: Letter From Defendant, Appellee, Respondent indicating Service of additional documents that are responsive to the Plaintiff, appellant, Petitioner's request for Production.

Date of Letter: FEBRUARY 7, 1992

"Mr. Oliver Ray Moore
5093 Whitworth
Memphis TN 38117

Dear Mr. Moore:

Enclosed please find copies of additional documents that are responsive to your request for production. These documents were produced to our offices this week. They relate to Installation Specialists.

Please call if you have any questions.

Sincerely,

Williams & Taylor

By Ann Carr Mackey

ACM/dlm

Enclosures

cc: re:Member Data Services, Inc."

United States District Court

Order Entry 145: "Order Denying Motion for Default, motion for Relief, and Motion For Sanctions"

"On December 22, 1991, Plaintiff, proceeding pro se, filed his motion for Default judgement, asserting that defendant has "failed to cooperate in proceedings of discovery: as to Plaintiff's Request for Production numbered 5 and 9. On December 23, 1991 plaintiff filed a Motion for Sanctions, asserting that defendant has "failed to cooperate in proceedings of discovery" as to plaintiff's Request for Production number 8 finally, on december 30, 1991, plaintiff filed his "Motion for Relief", in which he contends that defendants, in

defiance of orders of court, has delayed discovery; that plaintiff has "lost discovery"; and that, because of this, the court should "refuse" defendant's Motion for summary judgement.

As to the motion for default and for sanctions, it does appear that defendant has been derelict in its duty to fully respond to orders of this court, and that it is like pulling teeth to get defendant to produce information. However, as to the records of Alan Doyle, and plaintiff's concerns have at last been resolved as to Request number 8.

As to Request number 5 and 9, defendant, through counsel, has stated it has submitted all responsive documents in its possession, or to which it has access, and can find no others. Counsel for defendant has gone one step Further and has <u>verified</u> this response, subject to the penalty of perjury.

Without proof that counsel for defendant has lied under oath, or that defendant has violated FED.R.CIV. P. 11, this court has to assume that defendant has complied as best it can with the orders of this court.

Accordingly, Plaintiff's motion for default and his motion for sanctions are DENIED.

Plaintiff has also asked, in his "Motion for Relief", that because of defendant's delay in providing discovery, and because of the loss of discovery materials by plaintiff, this court should "refuse" defendant's motion for summary judgement.

As has been indicated before, plaintiff now apparently has all the discovery materials requested that can be produced by defendant. This court cannot help plaintiff with his problem of lost discovery. Plaintiff will be given forty-five (45) days from the date

of docketing of this order in which to respond to defendant's motion for summary judgement. This should be ample time for him to complete any discovery needed to respond to defendant's motion for summary judgement.

Under these circumstances, plaintiff's "Motion for Relief" is DENIED.

IT IS SO ORDERED.

ENTER THIS 24th Day OF JANUARY, 1992.

James H. Allen
United States Magistrate
Judge

AFFIDAVIT

AFFIDAVIT of Oliver Ray Moore,
Plaintiff, Appellant, ProSe

I, Oliver Ray Moore State in sound mind and body do state the following:

1. I do not have in my possession nor

have I ever been served Request for Production number 5, Kaiperm Federal Credit Union Pertchart from the Defendant, Re:Member Data, its counsel, or any one designated to serve this document.

2. At the time of the Trial Courts Consideration of Summary Judgement, I Could not identify Request for production number 9, I perceived conflicting facts and asserted to the best of my knowledge and interpretation of the rules of the court a conclusion and acted thereupon.

3. I have accumulated over 150 documents in support of the claims in the complaint and against the answers to the complaint.

4. I believe that every document

requested in the plaintiff Request for production will merit the plaintiff's case.

Oliver Ray Moore date 3-1-93

United States District Court

"ORDER ON MOTION TO COMPEL DISCOVERY"

Page 1 par 1.

Plaintiff Oliver Ray Moore, proceeding pro se, has served Interrogatories and request for production of documents upon defendant re: Member Data Services, Inc., and dissatisfied with some of the responses thereto , has filed, on August 23, 1991, a Motion for an Order compelling Discovery.

page 3 par 3-4.

Interrogatory number 26 asked whether Moore met "all goals

established in conjunction with task(sic) for conversion" as of his May 3, 1988, Performance Review. Defendant answered by saying that "Moore met the minimum goals of showing up every day and working hard". Plaintiff complains that this response is evasive. Plaintiff is correct. Defendant never answers whether Plaintiff met "all" goals, but merely says that plaintiff met "minimum" goals. Plaintiff has not been given a complete answer, and defendant must provide such an answer.

Page 3 par 5.

Interrogatory number 27 asked whether Moore Worked "Well as a member of conversion team" as of the May 3, 1988 Performance Review. Again, defendant's answer is incomplete, leaving room for <u>many</u> blanks to be filled in. For the

reasons above given, defendant must provide a more complete response.

page 5 par 2.

Request number 5 is said to have been produced, although plaintiff denies this. Defendant will have to see that Plaintiff gets the documents requested.

page 5 par 3-4.

Request number 6 asked for "all documents produced for any Tennessee Employment Security offices" Defendant Objected on grounds of relevancy.

The request is to broad, but defendant must produce all documents provided the Tennessee Employment Security office relating to plaintiff's termination by defendant and his subsequent effort to obtain unemployment security compensation.

Page 6 par 3-4.

Request number 9 Asked for all Custom Computer Applications, Inc., personnel files up until 1990". Defendant produced employee files of comparable employees (i.e., installation Specialists), and objected on relevancy grounds to further production.

Plaintiff has failed to show how this sensitive information would lead to the discovery of admissible evidence, and the position for the defendant is therefore well-taken.

page 6 par 5-end.

As to those discovery request, to which defendant is ordered to respond herein, this response must be made within twenty (20) days of the docketing of this order.

IT IS SO ORDERED.

Enter this 24th day of September, 1991.

James H. Allen. - United

States Magistrate Judge.

United States District Court

ORDER: ENTRY 101

ORDER OF REFERENCE

Presently before the court is plaintiff's Motion for Order Compelling Discovery, filed August 23, 1991.

IT IS SO ORDERED that the motion is referred to United States Magistrate Judge for a determination.

Any exceptions to the Magistrates Judge's order shall be made by motion within 10 days of the date of his order setting forth particularly those portions of the order excepted to and the reasons for the exceptions

Jerome Turner

United States District Judge

August 29, 1991

United States District Court

District Court entry 128

ORDER:

ORDER ON PARTIES' EXCEPTIONS TO ORDER ON MOTION TO COMPEL DISCOVERY

On September 26, 1991, the magistrate judge entered an Order on Motion to Compel Discovery to Which both parties have filed exceptions. The Court has reviewed the exceptions, including the parties' memoranda and responses, and finds that neither party has shown that the magistrate judge's order is clearly erroneous in any respect except as to the Request for Production No. 8. With respect to Request for Production No. 8, the court finds, in accordance with parties consent, that request should only apply to travel documents and travel that occurred during the time that CCA operated the company. The particular cut off date shall be identified by the defendant and the use of that particular date explained in the response to the

Request for production. The response to Request for Production No. 8 shall be limited to documents related to travel of installation specialist only to customer locations for installation and training. The defendant shall not be required to produce any invoices to customers for employee travel, but shall otherwise include all documents related to such employee travel.

In all other respects, the exceptions of the parties to the magistrate Judge's order are denied.

IT IS SO ORDERED this 19th day of November, 1991.

Jerome Turner

United States District Judge

United States district Court

Order Filed November 22,1991

ORDER ON MOTION TO EXTEND TIME

The Plaintiff has moved this court to extend the deadline for discovery

through January 31, 1992. The deadline for discovery has heretofore been extended to October 31, 1991, the deadline for the plaintiff's response to the defendant's Motion for Summary Judgement has been extended to December 31, 1991, and the time for plaintiff to file motions has also been extended to December 31, 1991.

The court does not feel that the extension through January 31, 1992 is appropriate or justified in this case.

The discovery deadline in this case shall be extended to December 20, 1991.

The Court Does not envision the granting of further requests for extension of time.

IT IS SO ORDERED THIS 19th day of November, 1991.

Jerome Turner

United States District Judge

United States District Court

Order ENTRY 126

Order Denying Motion for appropriate Sanctions.

Plaintiff has now moved the court for an order imposing sanctions against defendant herein for failure to comply with a previous discovery order of this court, relating to plaintiff's Interrogatories numbered 26 and 27, and plaintiff's Request for Production of Documents numbered 5 and 6. This order required further responses in some instances, and refused to require further responses in others. Both plaintiff and defendant appealed this order, and these appeals are now pending.

However, as to Interrogatories 26 and 27, and Requests for production of Documents 5 and 6, the september 26, 1991, Order required defendant to further respond, and defendant did not appeal this part of the September 26,

1991, order.

As of the time that plaintiff filed his Motion for appropriate Sanctions (on October 31, 1991), defendant had not answered Interrogatories number 26 and 27, and Request for Production of Documents numbered 5 and 6. Defendant did not answer, asserting that , since it had appealed certain other discovery decisions, and "to avoid possible confusion and duplicated efforts", It waited for a ruling on these appeals prior to filing any supplemental discovery answers.

However, defendant has indicated that, "solely to move this case forward and to avoid further time (sic) of the court and the Parties", It has prepared and served supplemental answers to plaintiff's Request for Production of Documents numbered 5 and 6.

Thus, plaintiff now has the discovery which is the subject of his motion for

Appropriate Sanctions.

Defendant's approach to this discovery controversy was quite inappropriate. As to that discovery ordered supplemented by the court, and not appealed, defendant should have responded in a timely fashion.

On the other hand, plaintiff has asked for sanctions in the form of a fine, a default, and orders prohibiting certain defenses. These sanctions Seem too severe Under all the circumstances.

Accordingly, plaintiff's request is denied.

IT IS SO ORDERED.

ENTER THIS 19th DAY OF NOVEMBER, 1991.

James H. ALLEN

United States Magistrate Judge

United States District Court

Order Entry: 137

entry date: 1-2-92

ORDER DENYING PLAINTIFF'S EXCEPTIONS TO MAGISTRATE JUDGE'S ORDER

Page 1 par 1

Plaintiff has excepted to the order Denying Motion for Appropriate Sanctions, entered November 21, 1991. In that order the magistrate judge held that defendant's decision not to properly respond to an un appealed discovery order until other appealed portions of the same order were resolved was "quite inappropriate" and that the discovery "should have been responded [to] in a timely fashion." The magistrate judge, however, denied the requested sanctions as "too severe." the requested sanctions included findings of contempt, fines of $500 per day, judgement by default and the preclusion of defenses. This court cannot find this ruling was clearly erroneous.

PAGE 2 PAR 2-end.

Plaintiff's exceptions are therefore denied.

IT IS SO ORDERED THIS 2nd Day of January, 1992.

Jerome Turner

United States District Judge

Date August 8, 1994